performance was founded entirely on Lord Cairns' Act and not section 24 of the Supreme Court of Judicature Act 1873.

I am therefore of the opinion I have no jurisdiction – the equitable jurisdiction conferred by Lord Cairns' Act – to award damages in lieu of specific performance in this case. I have, of course, jurisdiction to award damages at law for breach of contract. But, in this case, by reason of the exclusion clause damages cannot be awarded at law. In the result, no damages can be awarded either at law or in equity. The plaintiffs' claim is therefore dismissed.

The costs of these proceedings, however, should be borne substantially by the defendants for these reasons. First, as I have shown, the defendants' conduct largely contributed to the present litigation. Secondly, this action for specific performance was properly constituted, but because of the supervening events it has become unnecessary for this court to make an order for specific performance and for reasons I have given I cannot order damages in equity. In all the circumstances, I order the defendants to pay to the plaintiffs three quarters of the costs of and incidental to this action.

Order accordingly.

Solicitors: *Lim Ganesh & Liu; Lee & Lee.*

RE PAC-ASIAN SERVICES PTE. LTD.

[O.C.J. (Chao Hick Tin J.C.) December 16, 1987]

[Singapore – Companies Winding up No. 53 of 1986]

Company Law – Winding-up proceedings – Order of court appointing provisional liquidators – Order discharged – Whether provisional liquidators could be paid their remuneration and expenses – Whether company subject to winding up should pay for the remuneration and expenses – Principles applicable.

The three applicants were appointed by an order of court as provisional liquidators of a certain company which was the subject of a winding-up petition. The appointment of the applicants was made after an *ex parte* application was made by the petitioning creditor.

The company thereafter sought to discharge the appointment of the applicants as provisional liquidators. The application was refused but on appeal to the Court of Appeal, the order was discharged.

In view of the discharge of order, the questions arose as to whether the applicants should be paid their remuneration and expenses and if so by whom.

Held: (1) a provisional liquidator appointed by the court stands in precisely the same position as a court-appointed receiver. Such a provisional liquidator is an officer of the court. He is also in every sense a receiver;

(2) the provisional liquidators in the present case were entitled to be paid their just remuneration and be reimbursed of the expenses properly incurred out of the assets of the company that were administered by the provisional liquidators and were held by them. Accordingly, until determined by the court, they also have a lien over these assets up to an amount equivalent to their total claims.

Cases referred to:

(1) *Nationwide News Pty. Ltd.* v. *Samalot Enterprises Pty. Ltd. (No. 2)* [1986] 10 A.C.L.R. 748.
(2) *Starr* v. *Trafalgar Financial Corporation Ltd. No. 2* [1983] 8 A.C.L.R. 367.
(3) *Booth* v. *Thomson* [1972] S.L.T. 141.
(4) *Re Bridal Centre Co. Pty. Ltd.* [1985] 9 A.C.L.R. 481.
(5) *Re Central Commodities Services Pty. Ltd.* [1984] 8 A.C.L.R. 801.
(6) *Re Beni-Felkai Mining Co. Ltd.* [1934] Ch. 406.
(7) *Braid Builders Supply and Fuel Ltd.* v. *Genevieve Mortgage Corporation Ltd.* 29 D.L.R. (3d.) 373.
(8) *Campbell* v. *Compagnie Generale De Bellegarde* (1876) 2 Ch.D. 181.

COMPANIES WINDING-UP.

Davinder Singh for the applicants.
Manjit Singh for the company.

Cur. Adv. Vult.

Chao Hick Tin J.C.: The applicants, Jeffrey Heng, Wong Yew Meng and Roger Edmonds, were appointed by an order of court dated January 24, 1986 as provisional liquidators of the company pursuant to an *ex parte* application of the petitioning creditors, European Asian Bank Aktiengesellscheft ("EAB"), in these winding-up proceedings. The order was made subject to the usual undertaking as to damages.

The company thereafter applied to discharge the appointment of the provisional liquidators. The application was refused. On appeal to the Court of Appeal, the appellate court allowed the appeal and discharged the order dated January 24, 1986. The Court of Appeal also ordered that there would be

an inquiry by the Registrar as to the damages EAB should pay to the company. The provisional liquidators were not parties to the proceedings before the Court of Appeal. The present winding-up petition is still pending.

The questions that came before me for decision are these: In view of the discharge of the order appointing the provisional liquidators, are the provisional liquidators entitled to be paid their remuneration and expenses out of the assets of the company held by them? Do they have a lien over those assets? As counsel for the company put it, it is not in dispute that a provisional liquidator is entitled to his remuneration. The question in this case is, who is liable for the three provisional liquidators' remuneration and expenses. The company said that the provisional liquidators should look to EAB. However, the provisional liquidators contended that in law they are entitled to be paid their remuneration and expenses out of the assets of the company held by them. They also argued that as officers of the court, they are obliged to be directed by the court as to the manner in which the assets held by them are to be utilized. They further argued that the remedy for the company is to proceed against EAB, the petitioning creditors, on their undertaking on damages in respect of which the Court of Appeal has ordered an inquiry.

In the affidavit of January 7, 1987 of Lai Nai Yain filed on behalf of the company, the company also made allegations of improper discharge of duties on the part of the provisional liquidators. However, these are issues which do not concern the court at this stage.

The order of January 24, 1986 provided that the provisional liquidators shall have and may exercise all the functions and powers of a liquidator. It also stated that the salary or remuneration of the provisional liquidators be paid out of the assets of the company pursuant to section 328(1)(a) of the Companies Act ("the Act"). The Court of Appeal in discharging the order of January 24, 1986 did not deal with the question of the remuneration of the provisional liquidators as that question was not put before it.

A number of authorities have been cited to me by counsel of both parties. It seems to me that the most recent case on point is *Nationwide News Pty. Ltd.* v. *Samalot Enterprises Pty Ltd. (No. 2).*[1] That was a case of the Supreme Court of New South Wales decided by Mclelland J. In that case, a winding-up order was made and a liquidator appointed. It was subsequently discovered that as the company was incorporated in the Australian Capital Territory and not in New South Wales, the court had no power to wind-up the company. This led to two applications – one by the petitioner to set aside the winding-up order and the other by the liquidator for his remuneration. The court ordered that the liquidator's remuneration be paid out of the assets of the company and also set aside the winding-up order. Having reviewed the earlier cases, Mclelland J. said at p. 751:

> "The setting aside of the orders of November 20, 1985 will not affect Mr. Harkness's status as a liquidator between November 20, 1985 and the date of the setting aside of those orders, as the appointment remains valid for that period ... The powers of the court under section 373 to determine the remuneration of a liquidator or provisional liquidator may be exercised before or after the termination of his appointment. It cannot be suggested, for instance, that if a winding-up order were made and a liquidator appointed, thus terminating the appointment of a provisional liquidator, the former provisional liquidator could not thereafter make application under section 373 for determination of his remuneration. It would make no difference to the existence of the power that the appointment of the provisional liquidator was terminated not by the appointment of a liquidator but by dismissal of the winding-up proceedings as in *Re North Australian Properties Pty. Ltd.* and *Re Bridal Centre Co. Pty. Ltd.* [(1985) 9 A.C.L.R. 481] or by setting aside the original order, as in *Starr* [(1983) 8 A.C.L.R. 367]; similarly so far as a liquidator is concerned, by setting aside the original order, as in the present case or by an order terminating or staying the winding up. Furthermore, I have little doubt that a liquidator or provisional liquidator who is entitled to remuneration would normally have an equitable lien over the assets under his administration to secure payment of that entitlement as well as his expenses, analogous to the lien to which a court-appointed receiver is entitled: *Re Central Commodities Services Pty. Ltd.* (1984) 1 N.S.W.L.R. 25; 8 A.C.L.R. 801. That lien would survive the termination of his appointment."

Our equivalent to section 373 of the NSW Companies Act is section 268(2) of the Act which reads as follows:

> "(2) A provisional liquidator, other than the official receiver, shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the court."

Mclelland J. in *Nationwide* clearly disapproved of the earlier decision in *Starr* v. *Trafalgar Financial Corporation Ltd. No. (2)*[2] where it was held that where a voidable order for the appointment of a provisional liquidator had been made and subsequently rescinded for lack of jurisdiction to make the winding-up order, the provisional liquidator was not entitled to remuneration. Mclelland J. said at p. 751:

"It seems clear from the judgment in *Starr* that no submission based upon the terms of section 373 was put to Needham J. in that case. I respectfully agree with the way in which the equivalent provisions were applied in *Re North Australian Properties* and in *Re Bridal Centre Co. Pty. Ltd.*, and I think that the application of section 373 in the present case leads to the opposite conclusion to that reached in *Starr*. Section 373 confers on a liquidator a statutory entitlement to remuneration and confers on the court a statutory power to determine that remuneration, neither of which are dependent upon the continued subsistence of the order appointing the liquidator but only upon the liquidator's status as such."

In an earlier Scottish case, *Booth* v. *Thomson*,[3] a similar rule appears also to have been laid down. There two liquidators were appointed pursuant to a members' voluntary liquidation. Subsequently upon petition by creditors to wind-up the company compulsorily, a provisional liquidator was appointed by the court. Thereafter by consent, the appointment of the provisional liquidator was recalled. The liquidators in the voluntary liquidation then presented a petition asking the provisional liquidator to hand over funds in the latter's possession. The court held that, notwithstanding that the funds in the provisional liquidator's hands were liquid while his claim was illiquid, the provisional liquidator was entitled to retain the funds in his hand and to apply them so far as necessary in paying the remuneration and expenses claimed, thereafter accounting for the balance to the petitioners. Lord Fraser said at p. 142:

"There was no dispute that the provisional liquidator's remuneration and the expenses of his solicitors, which I have already found to be a proper charge upon the funds in the liquidation, would rank in priority to the claims of creditors, both ordinary and preferred. Counsel for the petitioners expressly conceded that that was so, and I do not think the concession could have been withheld."

and at p. 143 (in explaining how the court would exercise its discretion under section 307(2) of their Companies Act – our equivalent is section 310):

"I should add that, even if I had not been of that opinion, I would not have been disposed to make the order sought in the petition because I am not satisfied, as required by section 307(2) of the Companies Act, that the exercise of the power would have been 'just and beneficial'. On the contrary I think it would have been unjust, because the provisional liquidator, having performed his duties as an officer of the court, is, in my opinion, entitled to look to the court for protection. Having regard to the long duration of this voluntary liquidation, and to the difficulty experienced by other creditors of the company in obtaining payment of their debts, the respondents would, in my opinion, be unjustly treated if they were forced to pay over the money to the petitioners now, and were not allowed to retain and apply it towards meeting the sums due to them."

Counsel for the company sought to distinguish *Nationwide* from our case on the following grounds:

(i) there was no wrongful party or lack of good faith in *Nationwide;*

(ii) an equitable lien can only arise if there is no wrongful party; and

(iii) with the setting aside of the order of court of January 24, 1986, section 328(1) can no longer apply.

I do not think the lack of good faith on the part of the petitioning creditors should in any way affect the rights or entitlement of the provisional liquidators who were appointed by the court, although on the application of the petitioning creditors. The rule laid down in *Nationwide* is of general application. Nothing in the judgment of Mclelland J. justifies any such distinction to be drawn. It must always be borne in mind that a provisional liquidator is an officer of the court. He is not involved in the dispute between the petitioning creditor(s) and the debtor company.

Similarly, I also do not see any merit in the point made by the company that with the setting aside by the Court of Appeal of the order of court of January 24, 1986, the express provision in that order, that the remuneration of the provisional liquidators was to be paid out of the assets of the company pursuant to section 328(1)(a), is no longer available to the provisional liquidators. The setting aside cannot and should not affect what had been done by, or what was due and is still due to, the provisional liquidators before the setting aside. The setting aside can and should only operate prospectively and not retrospectively. In any event, the provisional liquidators' position should not be any worse off than a case where the said provision is not expressly spelt out in an order of appointment.

Counsel for the company also sought to rely on a sentence in the judgment of Kelly J. in *Re Bridal Centre Co. Pty. Ltd.*[4] at p. 488, which reads:

"In many cases where the petition is dismissed it would seem unjust that the remuneration should come out of the assets of the company and in those circumstances one would expect that those who seek the appointment of the provisional liquidator would eventually be responsible for his remuneration."

This statement is clearly *obiter*. In any event, it seems to me that counsel for the company has not given sufficient consideration to the second part of that sentence. The Court of Appeal in the present case has ordered an inquiry as to the damages suffered by the company. This must be what Kelly J. contemplated when he said, "Those who seek the appointment ... would eventually be responsible ..."

Perhaps, it may be useful to refer briefly to *Re Bridal Centre*[4]. There a petition was presented to wind-up the company in July 1981. A provisional liquidator, a partner in an accountancy firm, was appointed in the following month. In September 1981, by the consent of the parties, the winding-up petition was dismissed and the order appointing the provisional liquidator was discharged. There was no order as to costs but it was noted by the court that the provisional liquidator would be paid out of the company's funds held by him. The provisional liquidator was not represented in court but was aware of the consent orders proposed. He then appropriated $14,925 from the funds held by him for his costs. This amount represented charges for professional services rendered by one of his partners and several employees of his firm. The amount was challenged by two shareholders and directors of the company. The court held that, while the unilateral appropriation on the part of the provisional liquidator was wrong, the right of the provisional liquidator to remuneration was based on section 232(2) of their Ordinance (our section 268(2)) rather than the order appointing him. Kelly J. said at p. 488:

"The subsection was the only provision in the Ordinance which was concerned with the remuneration of a provisional liquidator. It does no violence to its language to construe it so that it provides the foundation for an order for such remuneration and also control its amount."

I turn next to the question whether the provisional liquidators have an equitable lien over the assets to meet their remuneration and expenses. As quoted above, Mclelland J. held in *Nationwide* that there is little doubt that a liquidator or provisional liquidator who is entitled to remuneration would normally have an equitable lien over the assets under his administration to secure payment of that entitlement as well as his expenses analogous to the lien to which a court-appointed receiver is entitled. That lien would also survive the termination of his appointment.

In *Re Central Commodities Services Pty. Ltd.*,[5] where it was a case concerning an application by a receiver for orders relating to priority of his claim for remuneration and expenses, Needham J. said at p. 803:

"It seems clear in my view that where a receiver is appointed by the court he can look to the assets of the company of which he is a receiver to meet his proper remuneration and the liabilities properly incurred. He has an indemnity over the assets and as such is entitled to a lien, and that lien, as established by *Bernard* v. *Davies* covers not only his remuneration but also his properly incurred expenses."

In *Re Beni-Felkai Mining Co. Ltd.*,[6] where it was a case of voluntary winding-up, Maugham J. at p. 419 distinguished a voluntary liquidator and a receiver appointed by the court this way:

"Such a receiver is the officer of the court and I can see no reason for coming to the conclusion that the liquidators in a voluntary winding up, whose remuneration has been fixed by shareholders who may have no interest in the ultimate assets, is in the same position as an officer of the court. The latter has his remuneration provided for in front, as far as possible, of every other payment to be made out of the assets of which the court has assumed control."

Kerr on Receivers (16th Ed.) at p. 220 sets out the position of the receiver as follows:

"A receiver and manager appointed by the court is entitled to be indemnified out of the assets against all liabilities properly incurred by him in carrying on the business; he is entitled to this indemnity (in addition to the rest of his costs, charges, expenses and remuneration) in priority to all other claims against the assets ..."

The rationale for this rule was succinctly stated by Dickson J.A. in *Braid Builders Supply and Fuel Ltd.* v. *Genevieve Mortgage Corporation Ltd.*[7] as follows:

"A receiver appointed by the court is the receiver of the court, not the receiver of the parties who sought the appointment ... In the performance of his duties the receiver is subject to the order and direction of the court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the court and not from the pocket of those who sought his appointment. This is subject however, to the proviso that at the time of the appointment the court may direct that one or other of the parties be responsible for such remuneration ..."

In my view, a provisional liquidator appointed by the court stands in precisely the same position as a court-appointed receiver. Such a provisional liquidator is an officer of the court. He is also in every sense a receiver – *Campbell* v. *Campanie Generale De Bellegarde.*[8] The reasons alluded

to above for giving a lien to such a court-appointed receiver over assets administered by him apply with equal force to a provisional liquidator appointed by the court.

In the light of the principles set out above, it is clear that the provisional liquidators in the present case are entitled to be paid their just remuneration and be reimbursed of the expenses properly incurred out of the assets of the company that were administered by the provisional liquidators and are now held by them. Accordingly, until determined by the court, they also have a lien over those assets, up to an amount equivalent to their total claims.

I should also state that the company has argued that as it had challenged the appointment of the provisional liquidators from the very start, the latter ought not to commence on their work. The company contended that in such circumstances, the provisional liquidators should have obtained (which they did) an indemnity from the bank. In my judgment, none of these affects the position of the provisional liquidators who were required on appointment, under section 269(1) of the Act, to "take into (their) custody or under (their) control all the property and things in action to which the company is or appears to be entitled."

For the foregoing reasons, I granted the orders prayed for in paragraphs 1 (with slight amendments) and 2 of the Summons-in-Chambers No. 11631/86.

I have not at this stage determined whether the claims of the provisional liquidators for remuneration and expenses are reasonable. Unless there is agreement between the parties, the details of the claims will have to be examined next.

Order accordingly.

Solicitors: *Drew & Napier; Manjit Darshan & Partners.*

RE TAI CHOI YU

[O.C.J. (Chan Sek Keong J.C.) December 5, 1987]

[Singapore — Admission of Advocates and Solicitors No. 167 of 1987]

Legal Profession — Practice Law Course — Examinations — Exemption from — Application for — Exemption not allowed — Review of decision of Board — Application for — Legal Profession Act (Cap. 161), ss. 11(2), 12(2)(a), 14(2) & 21.

The applicant, a qualified person under the Singapore Legal Profession Act, is a barrister-at-law. He had practised in Sarawak for about 19 years.

On November 4, 1986, the applicant, after having been informed by the Board of Legal Education of the statutory requirements for the admission of the applicant as an advocate and solicitor of the Supreme Court of Singapore, wrote to the Board for exemption from having to serve the period of pupillage required under section 12(2)(a) of the Act. The Board replied on November 8, 1986 granting the request of the applicant and informing him of the need to attend the Practice Law Course. The applicant thereafter also came to know that he had to pass an examination after the course. The applicant sought exemption from the examination, but the Board replied on August 26, 1987 that it was unable to grant such exemption.

The applicant, being dissatisfied with the Board's replies, applied to the court for review of the Board's "two decisions", namely:

(a) that the interpretation of the conditions specified by the respondent Board for the petitioner's call to the Singapore Bar contained in their letter dated November 8, 1986 required the petitioner to pass any examination as a condition precedent to the call and

(b) that the respondent "is unable to grant the petitioner exemption under section 11(2) of the Act by reason of his experience (which has been essentially limited to practice in Sarawak)."

Held: (1) in the court's view, the applicant's complaint that the "decision" of the Board in their letter of November 8, 1986 had misled him to act to his detriment was wholly misconceived;

(2) the court was not persuaded that the Board's decision was unreasonable under the *Wednesbury* principle as the Board applied the very consideration that was prescribed by section 11(2) of the Act, which is the experience of the qualified person.

Cases referred to:

(1) *Re 56 Denton Road, Twickenham* [1953] 1 Ch. 51.
(2) *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227.
(3) *Wells* v. *Minister of Housing and Local Government* [1967] 1 W.L.R. 1000.
(4) *Lever Finance Ltd.* v. *Westminster (City) London Borough Council* [1971] 1 Q.B. 222.